

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

MICHELINE NICOLE LEFFEW
Defendant-Appellant

_____ /

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Supreme Court No. 161797

Court of Appeals No. 343818

Lower Court No. 17-4120 FH

Defendant-Appellant's Supplemental Brief

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Statement of Question Presented

- I. Was Micheline Leffew deprived of her constitutional right to effective assistance of counsel where her attorney unreasonably failed to request that the jury be instructed on the common law affirmative defense of defense of others?

Court of Appeals answers, "No."

Micheline Nicole Leffew answers, "Yes."

Statement of Facts and Material Proceedings

In September 2017, Micheline Leffew and her husband Jeremiah Leffew moved to Michigan from Oregon. They stayed with Jeremiah's mother, Donna Knezevich and stepmother, Lisa Seibert. 153a-154a. Donna and Lisa have been partners for more than 25 years, since Jeremiah was a baby. 218a. In the summer of 2017, Donna and Lisa were also romantically involved with Michael Porter. 153a.

On November 14, 2017, Donna and Lisa had an argument and Lisa left the house she shared with Donna to stay with Mr. Porter. 221a. Four days later, Donna called Lisa at Mr. Porter's house and proposed marriage. 221a. Lisa accepted and asked Donna to come get her. 221a. Lisa waited to tell Mr. Porter she was leaving until minutes before Donna, Jeremiah, and Micheline arrived. 229a-230a. Mr. Porter was upset. 229a. He was infatuated with Lisa and did not want her to go back to Donna. 227a. See also 34a ("He kind of got obsessed with me . . . He didn't want me to leave."). When Mr. Porter learned that Donna was on her way to pick up Lisa, he got his gun; Lisa convinced him to put it away. 209a; 234a.

Around 4:00 p.m. Jeremiah, Donna, and Micheline arrived at Mr. Porter's house.¹ 294a-295a; 276a-277a. As soon as the car pulled into the driveway, Mr. Porter called 911. 222a.

The witnesses gave somewhat conflicting accounts of what happened next.

Micheline recalled that Jeremiah honked the horn and they waited in the car for Lisa to come outside. 277a. When Lisa did not appear after a few minutes, she and Jeremiah went to the front door and knocked. 277a. Donna followed soon after. 286a. Mr.

¹ Jeremiah drove because neither Donna nor Micheline had a driver's license. 222a.

Porter answered the door and Micheline told him that they were there to pick up Lisa. 278a. Micheline could see Lisa standing behind Mr. Porter, putting her coat on and grabbing her sunglasses. 278a. Micheline asked Lisa if she wanted to leave, and Lisa said “yes.” 278a. Before Lisa could leave, Mr. Porter said, “give me few minutes” and slammed the door. 278a, 287a.

Through the window Micheline saw Lisa move toward the door and Mr. Porter assault her. 287a. He grabbed Lisa from behind and dragged her away from the door. 278a. Micheline saw Lisa “get loose and try to go for the door” again, at which time Mr. Porter “grabbed her up” and dragged into another room. 278a-279a.

Likewise, Jeremiah saw Mr. Porter prevent Lisa from leaving. 296a-297a. First Mr. Porter grabbed Lisa and pulled her away from the door, toward the back of the house. 296a-297a. Lisa struggled away from him and started running. 297a. Jeremiah testified, “She had gotten away from him. After they got back by the hallway I seen her running for the door, she ran around the furniture in the living room, and she ran for the door, she grabbed the door. Mike came up behind her, grabbed her, and threw her straight back on the floor. She got up and he got [sic], he was right above her, and he just pushed her right back down in the chair.” 297a.

Micheline and Jeremiah could see what was happening inside the house through the big picture window next to Mr. Porter’s front door. 279a-280a; 296a-297a. They could also hear Lisa screaming “help.” 280a; 298a. Micheline testified, “Once I heard her scream for help, I knew I had to help her. So I ran around back, and I originally tried to open the door but it was locked. So I took my boots . . . and gave it two or three kicks, and it came open.” 280a. As soon as Micheline entered the house, Mr. Porter hit her in the

head with a large ashtray, which cut her head in several places, knocked her to the ground, and triggered a seizure. 280a-281a, 288a. Micheline has temporal lobe epilepsy and has suffered from seizures since she was 11 years old. 281a.

Jeremiah, who followed his wife to the back of the house, first went to the sliding glass door and tried, unsuccessfully, to open it. 298a. Through the sliding glass door, he saw Mr. Porter pin Lisa down in a chair and heard her screaming. 298a-299a. Next, Jeremiah heard a loud bang by the back door. 299a. He walked over and saw the door open and Micheline lying on the kitchen floor in a pool of blood, having a seizure. 299a-300a, 318a.

Jeremiah entered the house to help his wife. 300a-301a.

Mr. Porter then attacked Jeremiah, and the two men briefly fought until Jeremiah stopped the fight by brandishing a steak knife taken off the kitchen counter and pleading, “[p]lease just stop and let us go, stop fighting.” 300a-301a; 316a.² Mr. Porter backed off and Jeremiah picked Micheline up and helped her to their car. 302a-303a; 305a. While Jeremiah and Mr. Porter were fighting in the kitchen, Lisa ran out the front door. 167a.

When Micheline came to, she was cold, wet, and on the ground next to her car. 281a. Jeremiah was there trying to wake her up. 280a.

Jeremiah drove Donna, Lisa, and Micheline to the hospital so Lisa and Micheline could get medical help. 303a-304a. On the way to the hospital, Micheline called 911 and asked the police to meet her there. 284a-285a; 304a. Micheline had several cuts on her

² In response to the court’s attempt to elicit testimony from Jeremiah that he intended to have some effect on Porter’s behavior when he brandished a kitchen knife, Jeremiah testified: “I was just trying to defend myself and my wife.” 316a.

face and neck, and a laceration on her forehead that had to be closed with staples. 281a-283a: Defense Exhibit 2.

Deputy Christopher Ochab of the Arenac County Sherriff's department met Micheline, Jeremiah, Lisa, and Donna at St. Mary's of Michigan Standish Hospital. 255a-256a. He took statements from Micheline and Jeremiah who reported that Mr. Porter had assaulted Lisa and was preventing her from leaving his house until they entered to rescue her. 257a-258a.

As a result of this incident, Jeremiah was charged with assault with a dangerous weapon and Micheline was charged with home invasion third degree.³ 48a.⁴ Both Micheline and Jeremiah rejected misdemeanor plea offers after consultation with their respective attorneys. 458a-460a; 468a-469a; 480a-481a; 488a-489a.

Micheline was bound over as charged. 53a. Jeremiah was bound over on the original charge of assault with a dangerous weapon as well as on the charge of home invasion first degree. 49a, 53a-54a

At trial, counsel for Micheline made an opening statement setting forth his theory

³ MCL 750.110a(4)(a) provides that a person is guilty of home invasion in the third degree if the person does any of the following: Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Here, the prosecutor argued that Micheline committed the misdemeanor malicious destruction of a building less than \$200 when she broke Mr. Porter's kitchen door in the process of entering the house. 376a-377a.

⁴ As a result of this incident, Mr. Porter was charged with domestic violence, 422a, a fact which was never disclosed at trial. Notably, at Micheline and Jeremiah's preliminary exam, which took place one week after Mr. Porter entered a plea to possession of marijuana and disorderly person-jostling in exchange for dismissal of his original charges, 423a-430a, the same judge who presided over Mr. Porter's plea hearing indicated that Mr. Porter had not been charged with a crime. 50a.

of the case:

So they were going there, they get there, things change when they see Mr. Porter throwing Lisa around, keeping her from leaving. You have to think about what a reasonable person would do in this instance when they see that happening to their mother, how things changed, and it turned into an operation where Mr. and Mrs. Leffew were going to have to save their mother, and not wait for the cops to come, or let time pass by, while she is being manhandled by Mr. Porter.

Micheline Leffew, she goes by Mika for short, but Ms. Leffew, she'll testify that she did kick in the door; she'll testify today that she was hit in the head by Mr. Porter with an ashtray, which gashed her in the head.

* * *

Keep in mind that there's an underlying misdemeanor there, and keep in mind what those elements are. The one being the malicious, there's nothing malicious about what Micheline Leffew did on November 18th. She was going in there to save her mother-in-law. She was going in there to rescue someone. She wasn't doing anything wrongful, she wasn't doing anything without a just cause or excuse, she was saving someone. [147a-148a]

Lisa Seibert testified for the prosecution and significantly changed her story from the one she told at the preliminary examination. 218a-226a.

At the preliminary exam, Lisa testified that on the day of the incident she wanted to leave Mr. Porter's house, but he was holding her against her will. 34a-35a. She recalled that Micheline came to the door and asked her if she wanted to leave. When Lisa said yes, Mr. Porter slammed the door in Micheline's face. 38a. Next, Mr. Porter grabbed her. 38a. Lisa managed to get away from him and reach the doorknob, but Mr. Porter grabbed her again and "put [her] on the floor right there." 38a. Mr. Porter then grabbed Lisa from the floor and took her into the dining room. 38a. He was yelling and restrained her in a chair by sitting on her. 38a, 41a. Lisa screamed for help and for him to let her go. 38a, 41a, 42a.

A short time later, Lisa heard the back door get kicked in and someone yell “run Leese.” 39a. She did. 39a. When Lisa reentered the house, she saw Mr. Porter and Jeremiah standing in a corner and Micheline on the floor having a seizure. 39a, 40a.

At trial, Lisa testified that Mr. Porter accidentally knocked her over while trying to talk her into staying at his house. 235a. When confronted with her preliminary exam testimony (232a-235a), Lisa acknowledged that it was correct, but maintained that she did not think Mr. Porter’s actions were intentional. 235a (“I don’t think it was an intentional knockdown” and “that’s a fair statement (referring to her previous statement that she was not able to leave because she was thrown to the floor) but it wasn’t intentional”); 238a. At trial, like at the preliminary exam, Lisa testified that Micheline was still on the kitchen floor when she reentered Mr. Porter’s house, after Jeremiah and Mr. Porter stopped fighting. 225a. Lisa saw Jeremiah take Micheline out the front door and noted that Micheline was “bleeding on her face, and she was real incoherent because she had a seizure.” 224a.

Lisa was further confronted with the signed statement she gave to police on the night of the incident. 237a. Lisa’s written statement is consistent with her preliminary exam testimony – that Mr. Porter pushed her to the floor, pulled her up, put her in a chair, kept her there, and would not let her leave his house. 238a.

Lisa changed her story after a domestic violence incident between Jeremiah and Donna which resulted in Donna’s arrest. 239a. Lisa held Jeremiah and Micheline responsible for Donna’s incarceration. 239a. Lisa also claimed that Micheline and Jeremiah pressured her into her testimony at the preliminary exam. 240a.

Mr. Porter's account of what happened that day was considerably different from the other witnesses. He testified that when he asked Micheline and Jeremiah for a few minutes with Lisa, they pounded on the door and window of his house and threatened to kill him. 161a. Then Lisa fainted and fell down. 199a, 211a-212a. Mr. Porter explained, "She was sliding down the door, she was kind of upset, so I took her by the hands, and I picked her up, and I walked her out, sat her down in the dining room." 161a-162a, 199a, 212a. Mr. Porter said he was standing in the dining room trying to talk to Lisa when he heard beating on the back door. 163a. When the back door opened and Micheline stepped inside, Mr. Porter smacked her in the head with an ashtray. 164a. Micheline fell to the floor and Jeremiah entered next. 164a. Micheline was "bleeding a little" and "kind of like moving around a little bit." 206a.

Mr. Porter claimed that Jeremiah came at him, so he punched Jeremiah a few times before Micheline "jumped up off the floor, and jumped on my back" yelling "let's kill him." 165a. According to Mr. Porter, Jeremiah then rifled through his drawers, found a steak knife, and tried to stab him with it. 165a. The fight ended when Donna came in and yelled something to Jeremiah. 167a.

In closing, defense counsel for Ms. Leffew acknowledged that she had kicked open Mr. Porter's door and entered his house, but asserted she was not guilty of third-degree home invasion because her destruction of the door was not without just cause or excuse:

But just keep in mind that that third element, knowing that is [sic] was wrong without just cause or excuse, because that's where this whole crime that Ms. Leffew is charged with falls apart. She had just cause to go kick in that door and let Ms. Seibert out. You know, it's her mother-in-law; she sees a woman get thrown around, that's not right at all. Of course she's going to get in there and let her out. Whether it was wrong or not that's for you to decide. It wouldn't have been

wrong in that situation because, like we said, she's rescuing her mother-in-law. [358a]

Thereafter, the trial court provided the standard jury instructions for home invasion third degree and malicious destruction of a building less than \$200. 376a-377a. Defense counsel did not request, and the trial court did not provide, a defense of others instruction.

Micheline was convicted as charged. 381a. The Honorable Laura A. Frawley from the Arenac County Circuit Court sentenced Micheline to five months in jail, two years of probation, restitution and court costs. 399a-403a. Jeremiah was convicted as charged of first-degree home invasion and felonious assault, 381a, and later sentenced to 25 to 40 years in prison, 417a.

Micheline filed a timely brief on appeal and motion to remand in the Court of Appeals and made the following offer of proof in support of her request that the Court remand for a *Ginther* hearing.

The Arenac County Prosecutor's Office charged Mr. Porter with possession with intent to distribute marijuana and domestic violence against Lisa Seibert based on his actions on the night of the incident. 422a. He later pled guilty to possession of marijuana and disorderly person—jostling. 423a-430a; see also 438a-444a. In exchange for his plea, the prosecution dismissed the initial charges. 422a; 425a-526a. Mr. Porter was sentenced to four days in jail. 431a-437a.

In addition to her preliminary examination testimony and her initial statement to the police on the night of the incident, Lisa also sought a personal protection order against Mr. Porter. 445a-449a. As part of that application, Lisa endorsed a three-page

statement, detailing the intentional and physical nature of Mr. Porter's attack on the night of the incident. 446a-449a.

Neither Mr. Porter's criminal charges and plea agreement nor Lisa's petition for a personal protection order were used to impeach these witnesses or otherwise offered into evidence at trial.

As set forth in the offer of proof in support of the motion to remand, undersigned counsel interviewed Micheline's trial attorney by phone on January 15, 2019, to inquire about these issues. Trial counsel reported that he had no strategic purpose for not requesting the defense of others instruction and conceded he should have requested it. Trial counsel had no recollection of Lisa's PPO or Mr. Porter's related case.

On March 12, 2019, the Court of Appeals issued an order denying the motion to remand. 451a.

On April 9, 2020, the Court of Appeals issued an unpublished opinion affirming Ms. Leffew's conviction and sentence. 509a-519a. The court found that Micheline failed to provide persuasive authority that the common law defense of defense of others applied to justify the home invasion in this case and that trial counsel was not ineffective for failing to advance a novel legal argument. 511a.

This Court has ordered oral argument on Micheline and Jeremiah's applications for leave to appeal the affirmance of their convictions. *People v Leffew*, __ Mich __; 951 NW2d 903 (2020) (Mem). At issue is "whether the common law defense of defense of others may be raised as a defense to the felony and misdemeanor charges against them . . . and whether trial defense counsels' failure to request such an instruction deprived the defendants of the effective assistance of counsel." *Id.*

Argument

- I. Micheline Leffew was deprived of her constitutional right to effective assistance of counsel where her attorney unreasonably failed to request that the jury be instructed on the common law affirmative defense of defense of others.**

Standard of Review and Issue Preservation

Ms. Leffew preserved her claim of ineffective assistance of counsel by timely filing a motion to remand under MCR 7.211(C)(1) and *People v Ginther*, 390 Mich 436 (1973). The request for a hearing was denied, and in the absence of an evidentiary hearing in the trial court, review on appeal is limited to mistakes apparent on the lower court record. *People v Matuszak*, 263 Mich App 42, 48 (2004); *People v Rodriguez*, 251 Mich App 10, 38 (2002).

Claims of ineffective assistance of counsel are reviewed de novo under the two-part test set forth in *Strickland v Washington*, 466 US 668 (1984). Ineffectiveness claims present mixed questions of law and fact. *Id.* at 698; *People v LeBlanc*, 465 Mich 575, 579 (2002). Questions of law are reviewed de novo. *LeBlanc*, 465 Mich at 579. Questions of fact are reviewed for clear error. *Id.*; MCR 2.613(C).

The availability of an affirmative defense is a legal question that is reviewed de novo. *People v Dupree*, 486 Mich 693, 702 (2010).

Argument

Ms. Leffew did not deny intentionally breaking Mr. Porter's door or entering his home without permission. Rather, she asserted she was justified in entering the home in order to save Lisa Seibert from imminent physical injury. Her attorney argued these facts at trial, yet unreasonably failed to request that the jury be instructed on the common law affirmative defense of defense of others.

The common law affirmative defense of defense of others was available to Ms. Leffew. Its availability was supported by the facts, by the case law—specifically this Court’s decision in *People v Dupree*, and the statutes under which she was charged. Even if there was some unclarity as to the availability of the offense, it was defense counsel’s obligation as Ms. Leffew’s advocate to advance the argument favorable to her and consistent with his other strategic choices. See *People v Ceasor*, __ Mich __ ; __ NW2d __ (2021).

Trial counsel’s failure to seek a jury instruction on the affirmative defense constituted ineffective assistance of counsel. Without it, the jury was given no guidance on how to determine whether Ms. Leffew’s actions were justified under the circumstances. A properly instructed jury would have learned that Ms. Leffew was justified in breaking and entering Mr. Porter’s home if she honestly and reasonably believed intervention was necessary to prevent imminent harm to Ms. Seibert at the hands of Mr. Porter. It would have been told to make allowances for the excitement of the moment and that the prosecution bore the burden of disproving Ms. Leffew’s affirmative defense beyond a reasonable doubt. Had the jury been properly instructed, it is reasonably likely they would have found Ms. Leffew not guilty of third degree home invasion. Counsel’s failure deprived Ms. Leffew of her constitutional right to the effective assistance of counsel. A new trial is warranted.

**A. The common law affirmative defense of defense of others
was available to Micheline Leffew.**

Self-defense and defense of others are common law affirmative defenses that are embedded in our criminal jurisprudence. *Dupree*, 486 Mich at 705; *People v Kurr* 253 Mich App 317 (2002).

The common law right to defend a third person arises from the right of self-defense. M. Bendinelli & J. Edsall, *Defense of Others: Origins, Requirements, Limitations and Ramifications*, 5 Regent U L Rev 153 (1995). In essence, “the right of one to defend another is coextensive with the right of the other to defend himself.” *Id.* citing *Lovejoy v State*, 15 So2d 300, 301 (Ala, 1943); cf. *Commonwealth v Colantonio*, 577 NE2d 314, 319 (Mass App, 1991).

Self-defense and defense of others are rooted in the concept of “necessity.” *People v Reese*, 491 Mich 127 (2012); see also *United States v Bailey*, 444 US 394 (1980). The common law principle is that one may act in defense of another when, under the circumstances as they appear at the time of the incident, she has an honest and reasonable belief that a third person is immediate danger of harm, even if the defensive steps taken would otherwise violate a criminal law. *People v Riddle*, 47 Mich 116, 119, 120 n 8 (2002). The conduct and force employed by one who claims self-defense or defense of others must be reasonable, and the defendant cannot be the initial aggressor. *Id.*

At common law, there is no requirement that the individual be somewhere “he or she has the legal right to be” to make the plea of self-defense available. MCL 780.972(2). Rather, common law self-defense may be raised where a defendant “is free from fault” and is “a nonaggressor.” *Riddle*, 467 Mich at 119, 126. As this Court explained in *People v Townes*, 391 Mich 578 (1974), “[a]lthough a wrongdoer generally may not avail himself of self-defense plea, the mere fact that defendant was allegedly engaged in committing trespass when the deceased attacked him would not necessarily constitute the defendant a wrongdoer so as to preclude defendant from raising self-defense issue.” Criminal

activity by a defendant can only defeat a claim of self-defense if it entails the defendant acting as the aggressor, e.g., the defendant initiates the assault. *Id.*

Where a defense of others claim lies within the range of the direct and circumstantial evidence, instructions on the defense must be given. *Kurr*, 253 Mich App at 326-327. Once a defendant presents a prima facie claim of defense of others, the burden lies with the prosecution to disprove the claim beyond a reasonable doubt. *Dupree*, 486 Mich at 709-710; *People v Denson*, 500 Mich 385, 399 (2017).

1. The statutes under which Ms. Leffew was charged allowed her to rely on the affirmative defense of defense of others to justify taking action that would otherwise violate the statutes. The common law was left untouched by MCL 750.110 and MCL 750.380.

Ms. Leffew was charged with home invasion third degree (MCL 750.110) based on the theory that she committed the misdemeanor malicious destruction of a building less than \$200 (MCL 750.380) while entering, present in, or exiting the home. In enacting MCL 750.110 and MCL 750.380 the Legislature did not abrogate or modify common law defenses. While neither statute addresses whether the common law affirmative defenses of self-defense and defense of others are available, the absence of a clear statutory recognition of the defense does not bar a defendant from relying on the defense to justify her violation of the statute. See *Dupree*, 486 Mich at 705; see also *People v Triplett*, 499 Mich 52 (2016).

Furthermore, the elements of malicious destruction of a building,⁵ which criminalizes intentional damage to a building “without just cause or excuse,” signal an

⁵ The statutory crime of malicious destruction of property is an affirmance of the common law crime of malicious mischief. *People v Culp*, 108 Mich App 452, 458 (1981).

intent to allow defendants charged with the crime to assert the common law defenses of self-defense and defense of others.⁶ CJI2d 32.3. This language directly provides for affirmative justification defenses. See *US v Taylor*, 686 F3d 182 (CA 3, 2012) (holding that the “without just cause or excuse” language in the federal assault with a dangerous weapon statute is a reference to common law justification and excuse defenses, not an element.”).

Statutes must be strictly construed and shall “not be extended by implication to abrogate established rules of common law.” *People v Moreno*, 491 Mich 38, 46 (2012), quoting *Rusinek v Schultz, Snyder & Steele Lumber Co.*, 411 Mich 502, 508 (1981). While the Legislature may modify the common law, it must do so unambiguously and in “no uncertain terms.” *Hosterman Gen. Contracting, Inc. v Hahn*, 474 Mich 66, 74 (2006), accord, *Moreno*, 491 Mich at 46. Where a statute is silent as to a common law defense, the presumption against abrogation is not overcome and the defense survives the legislation. *Dupree*, 486 Mich at 705.

This Court has applied this presumption against abrogation in two recent cases to reaffirm the availability of the traditional common law defense of self-defense in the wake of statutory enactments. Notably, in doing so, it made clear that under common law, the defense applies to non-assaultive crimes. In *People v Dupree*, this Court refused to find an implied abrogation for self-defense in the felon-in-possession statute, which makes no mention either way of the affirmative defense. Rather, the Court concluded “[a]bsent

⁶ The elements of malicious destruction of a building are: (1) the building, or a permanent attachment thereto, belonged to someone other than the defendant; (2) the defendant destroyed or damaged the building or a permanent attachment; (3) the defendant did so knowing that it was wrong, without just cause or excuse, and with the intent to damage or destroy the property; and (4) the damage exceeded \$100. CJI2d 32.3.

some clear indication” in the statute that the Legislature abrogated or modified the firmly embedded common law affirmative defense of self-defense, the defense remains available to a defendant “if supported by sufficient evidence.” *Dupree*, 486 Mich at 706.⁷ Likewise, in *People v Triplett*, this Court observed that where there was “no ‘clear indication’ that the Legislature abrogated or modified the common-law defense of self-defense in the CCW statute” the defendant was justified in taking action that would otherwise violate the statute unless the prosecution disproved beyond a reasonable doubt his claim of self-defense. 499 Mich at 58.

Nor was the common law defense of others abrogated by the Self Defense Act, MCL 780.971 *et seq.* (“SDA”). The SDA did “not diminish an individual’s right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006.” MCL 780.974. The SDA “altered the common law of self-defense [only] concerning the duty to retreat.” *People v Conyer*, 281 Mich App 526, 530 (2008); see also *People v Guajardo*, 300 Mich App 26, 35–36 (2013).⁸ Self-defense and defense of others claims

⁷ The Court followed a similar path in *People v Moreno*, which considered whether citizens have a right to resist unlawful arrests or other police misconduct and avoid liability for resisting and obstructing a police officer under MCL 750.81d. Since Michigan has a long common law history of allowing self-defense against unlawful police actions, MCL 750.81d’s silence as to whether the Legislature intended to modify or abrogate that tradition meant self-defense survived enactment of that statute. *Moreno*, 491 Mich at 48–53. Thus, the defendant in *Moreno* could lawfully resist police officers who entered his home without a warrant. *Id.*

⁸ The SDA “created a new substantive right, i.e., the right to stand one’s ground and not retreat before using deadly force in certain circumstances in which a duty to retreat would have existed at common law.” *People v Conyer*, 281 Mich App 526, 530 (2008).

grounded in the common law do not have the same requirements as those brought under the SDA.⁹

In sum, the Legislature did not abrogate or modify the common law affirmative defense of defense of others in the home invasion or malicious destruction of a building statutes such that Ms. Leffew would be precluded from asserting it to justify her actions. Thus, the defense was available to her and she should have been allowed to present defense of others as an affirmative defense to her charges.

2. The availability of the common law affirmative defense of defense of others is threat-specific rather than offense-specific. This Court has made clear that engaging in conduct that would otherwise constitute a non-assaultive crime can be justified where there is an honest belief of an imminent threat and the steps taken to repel that threat are reasonable.

While historically viewed as a defense to homicide or other assaultive offenses, the law does not limit self-defense or defense of others to certain offenses or categories of offenses. See *Dupree*, 486 Mich at 707.¹⁰ Common law self-defense justifies “otherwise punishable criminal conduct” *Id.* (emphasis added) (internal citations omitted). See also *Criminal Law Defenses* at § 24(b), p 86 (“All justification

⁹ Again, this is because the SDA allows a person to stand his or her ground in self-defense and not retreat, even outside a homestead, but only if the “individual ... has not or is not engaged in the commission of a crime at the time he or she uses deadly force[.]” MCL 780.972(1).

¹⁰ 2 LaFave, § 10.4(a), pp. 143–144 (stating that a person can claim self-defense to justify “murder and manslaughter, attempted murder, assault and battery and the aggravated forms of assault and battery, and perhaps other crimes as well”); Jerome Hall & Gerhard Mueller, *Cases and Readings on Criminal Law and Procedure* 663 (2d ed. Bobbs Merrill 1965) (suggesting that a person can claim self-defense to justify property crimes). See, e.g., *Jones v Commonwealth*, 172 Va 615, 619–20 (1939) (holding that the defense of defense of others is applicable to common-law robbery).

defenses share a similar internal structure: special triggering circumstances permit a necessary and proportional response.”).

This Court has made clear that engaging in conduct that would otherwise constitute a non-assaultive crime can be justified when done in self-defense. In *Dupree*, this Court held that self-defense was an available affirmative defense to a felon-in-possession charge under MCL 750.224f when the felon’s temporary possession of a firearm was the result of an attempt to repel an imminent threat. *Id.* at 706. Likewise, in *Triplett*, this Court held that self-defense was an available affirmative defense to a carrying a concealed weapon (CCW) charge under MCL 750.227 when the concealed instrument is considered a dangerous weapon only because it was used as a weapon. 499 Mich at 57-58. See also *People v Goree*, 296 Mich App 293, 302 (2012) (self-defense is an available affirmative defense to felony-firearm).¹¹ Neither of these offenses are assaultive in nature; both are deemed public safety crimes rather than crimes against a person. MCL 750.224f; MCL 750.227; MCL 777.5 (Designation of Offense Categories).

While this Court has not explicitly addressed whether an individual charged with home invasion or malicious destruction of a building can assert common law self-defense or defense of others to justify her otherwise criminal actions, *Dupree* and *Triplett* answer any doubt on that score. When determining whether the common law defenses of self-defense and defense of others are available as a defense to a charge, this Court has primarily considered the nature of the threat, what is honestly and reasonably perceived, and whether whatever steps taken to repel the threat are reasonably necessary. *Dupree*,

¹¹ Nor is the SDA limited to assaultive crimes. See also *People v Guajardo*, 300 Mich App 26 (2013) (applying *Dupree* to hold that self-defense under the SDA, MCL 780.971 et seq, applies to felon in possession charge).

486 Mich at 707-709. *Dupree* and *Triplett* demonstrate that the nature of the threat dictates whether self-defense and defense of others is available, and not the charges lodged against the defendant unless the Legislature has made clear its intent to preclude the defense.

In sum, when an individual's actions are justified as self-defense, the individual cannot be found guilty of any crime associated with her acts "made in proper self-defense." *Dupree*, 486 Mich at 708 (citations and quotation omitted). Like felony-firearm and CCW, the act of home invasion or malicious destruction of a building, can be intermediary actions necessary to be able to come to the aid of a person who is being assaulted and is at risk of serious injury. Thus, if supported by sufficient evidence, these otherwise criminal acts can be justified by acting in defense of others, just as the offenses of felon in possession and CCW can be.

Here, there was substantial evidence that Ms. Leffew honestly and reasonably perceived Lisa Seibert was in imminent danger of great bodily harm at the hands of Michael Porter and that immediate intervention was necessary to protect her. She witnessed Mr. Porter prevent Ms. Seibert from leaving his home, assault her, and drag her into a different room out of view. While this was happening, she could hear Ms. Seibert screaming and yelling for help. She ran around the house and saw Ms. Seibert in a chair with Mr. Porter on top of her, holding her down. Ms. Leffew then kicked in the back door and tried to enter the house to help her mother-in-law.

Ms. Leffew was not an aggressor. She came to Mr. Porter's house to pick Ms. Seibert up at Ms. Seibert's request. She did not initiate the assault, and her otherwise criminal conduct was a reasonably necessary direct response to the threat.

Though one can imagine countless scenarios where it could be necessary to trespass, break and enter, or enter without permission in order to come to the aid of someone who is in danger as a result of the unlawful actions of others, the facts of the instant case are exemplary. A loved one needed help and protection from an assault and an unlawful imprisonment. Ms. Leffew did what was necessary to protect her loved one from that danger.

3. The State's position limiting the defense to assaultive crimes raises public policy concerns.

As a policy matter, whether a defendant can claim self-defense or defense of others as a justification for engaging in otherwise criminal conduct should not turn on the class or category of the offense as opposed to the triggering circumstances. Making self-defense and defense of others per se unavailable to entire classes of charges would lead to illogical and unacceptable results. For example, someone who defended herself against an unprovoked attack and in the process intentionally damaged her assailant's weapon, could be acquitted of assault, but convicted of malicious destruction of property. This is particularly so in Michigan where the necessity or "choice between evils" defense is limited to situations in which the source of the compulsion is a "natural physical force." *People v Jones*, 193 Mich App 551, 554 (1992), rev'd in part on other grounds, 443 Mich 88 (1993)).

Furthermore, a conclusion that the availability of self-defense and defense of others is offense-specific and not threat-specific would place too much importance on the prosecutor's charging decisions. See *State v Arth*, 87 P 3d 1206, 1209 (Wash App, 2004) ("[W]e note that if the State had charged Arth with assault under this precise set of facts, self-defense would have been available to him. There is no logical or legal reason why the

right to protect oneself should turn on the State's charging decision in a particular case.”). It may also create perverse incentives for people who are threatened to engage in assaultive conduct, when less violent or non-violent means could be sufficient.

Finally, the principles animating common law defense of others support a conclusion that a person is justified entering another person's dwelling if it reasonably appears to be necessary to prevent serious harm to a third person. Defense of others, like self-defense, is a justification defense. Justification defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be “outweighed by the need to avoid an even greater harm or to further a greater societal interest.... Thus, conduct that is found to be justified is, under the circumstances, not criminal.” P. Robinson, *Criminal Law Defenses* (1984) § 24(a), p 83. The societal interest justifying defense of others is to discourage calculated indifference to the plight of others and encourage people to go to the aid of third parties who are in danger of harm as the result of the unlawful actions of others. *Com v Monico*, 373 Mass 298, 303 (1977) (internal citations omitted).

Indeed, the idea that “[o]ne may sacrifice the personal property of another to save his life or the lives of his fellows,” *Ploof v Putnam*, 71 A 188, 189 (Vt, 1908),¹² is well-established in tort law. *See, e.g.*, Restatement (Second) of Torts § 261 (1965); *Mouse's Case*, 12 Co. Rep. 63; 77 Eng. Rep. 1341, 1341-42 (1608). The Restatement (Second) of Torts § 197 (1965) expressly recognizes a “privilege” to forcibly enter another person's

¹² This case was cited favorably in *People v Frederick*, 500 Mich 228, 240 n 8 (2017).

dwelling if it “reasonably appears to be necessary to prevent serious harm to” a third person.¹³

The traditional common law defense of defense of others was available to Ms. Leffew; it was the defense that her trial attorney argued at trial, and she was permitted to have the jury instructed on that defense.

B. It was objectively unreasonable for trial counsel to fail to request that the jury be instructed regarding the affirmative defense he presented. But for this failure, there is a reasonable probability of a different outcome.

Ms. Leffew had a right under the Fifth and Sixth Amendments to a meaningful opportunity to present a complete defense. US Const, Ams V, VI, XIV; Const 1963, art 1, § 17; *California v Trombetta*, 467 US 479, 485 (1984); *Chambers v Mississippi*, 410 US 284, 294, 302 (1973). To that end, she was entitled to have a properly instructed jury consider the evidence against her. *People v Rodriguez*, 463 Mich 466, 472 (2000). “Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574 (2000); MCL 768.29.

Defense counsel’s failure to request a defense of others instruction, and its corollary instruction regarding burden of proof, was objectively unreasonable. Counsel

¹³ See The Restatement (Second) of Torts § 197 (1965) cmt. g (“The actor is privileged to break and enter or to destroy a fence or other enclosure and indeed a building, including a dwelling, in so far as such acts are reasonably necessary to accomplish the privilege.”); cmt. h (“The privilege stated in this Section includes the privilege to enter or to remain in a dwelling”); illustration 8 (“A, passing B’s dwelling, hears issuing from it screams indicating that some person inside is in distress. A is privileged to enter the dwelling for the purpose of rendering assistance.”). Further, if A forcibly enters B’s house to save C, A is not liable for any damage done if the threat to C was “caused by the tortious conduct or contributory negligence of” B. *Id.* It makes little sense that, under these circumstances, A—though free from tort liability—could still be held criminally liable.

argued that Ms. Leffew was justified in entering Mr. Porter's home in order to save Ms. Seibert (358a), but he failed to ensure the jury was instructed as to what constitutes proper justification. As discussed above, the defense case did not depend on a novel application of the law, and a rational view of the evidence supported an instruction on the defense of others. See *United States v Johnson*, 416 F3d 464, 467 (CA 6, 2005) ("Where a defendant claims an affirmative defense, and that defense finds some support in the evidence and in the law, the defendant is entitled to have the claimed defense discussed in the jury instructions. This burden is not a heavy one.") (internal citations and quotation marks omitted).

Counsel's error deprived Ms. Leffew of her due process right to present a defense. *Kurr*, 253 Mich App at 327. In light of the evidence presented at trial, there is at least reasonable probability that a properly instructed jury would have reached a different outcome.

To establish ineffective assistance of counsel, Ms. Leffew must show: (1) that her attorney's performance was objectively unreasonable, and (2) there is a reasonable probability but for counsel's errors the result of the proceeding would have been different. *Strickland*, 466 US at 687-688; *People v Carbin*, 463 Mich 590, 599-600 (2001). A reasonable probability does not mean a certainty, or even a more likely than not outcome. *Strickland*, 466 US at 694.

1. Trial counsel's failure to ensure the jury was instructed on the law applicable to Ms. Leffew's sole defense constituted deficient performance.

Trial counsel conceded all the elements of third-degree home invasion with the exception of criminal intent. His sole defense was that Ms. Leffew was justified in damaging Mr. Porter's door (and entering his house) because she was acting in defense

of her mother-in-law, Lisa Seibert. The defense is not barred by statute, and this Court's decision in *Dupree* made clear that under the common law, self-defense and defense of others apply to non-assaultive crimes. *Dupree*, 486 Mich at 706-708. Trial counsel's failure to request that the jury be instructed on the affirmative defense that was available, supported by the evidence, and critical to his theory of the case, was objectively unreasonable. *Hinton v Alabama*, 571 US 263, 274 (2014) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic legal research on that point is a quintessential example of unreasonable performance under *Strickland*.").

As to the elements of the charged offense, third-degree home invasion, the court instructed the jury as follows:

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant broke and entered a dwelling. It does not matter whether anything was actually broken, however, some force must have been used. Opening a door, raising a window, or taking off a screen are all examples of enough force to count as breaking. For an entry, it does not matter whether the defendant got her entire body inside. If the defendant put any part of her body into the dwelling, that is enough to count as an entry. Second, that [when] the defendant entered, was present in, or was leaving the dwelling, she committed a misdemeanor. In this case it's alleged that that was Malicious Destruction of a Building under \$200. [376a]

The court then instructed the jury on the elements of the alleged underlying misdemeanor, malicious destruction of a building under \$200:

In determining whether she committed that misdemeanor you must consider, with the evidence, and she's not charged with a misdemeanor, but you have to find that there was an intent¹⁴ to

¹⁴ The trial court improperly instructed the jury that they merely had to conclude Ms. Leffew had the intent to commit the misdemeanor offense. However, given Ms. Leffew's admission at trial that she damaged Porter's door, this error was harmless.

commit a misdemeanor before you can find her guilty of the breaking and entering. And that Malicious Destruction of Property, of a Building under \$200, the elements are: First, that the building or anything permanently attached to it belongs to someone else. Second, that the defendant destroyed or damaged that building or anything permanently attached to it. Third, that the defendant did this knowing that it was wrong, without just cause of [sic] excuse, and with the intent to damage or destroy the property, and fourth, that the extent of the damage was some amount less than \$200. (376a-377a)

The facts and the law required that the jury be given at least a modified version of Michigan Model Criminal Jury Instruction 7.22 Use of Nondeadly Force in Self-Defense or Defense of Others.¹⁵ The modified instruction would have included the following principles.

- (1) The defendant claims that she acted in lawful defense of Lisa Seibert. A person has the right to act in defense of another person under certain circumstances. If a person acts in lawful defense of others, **her actions are justified**, and she is not guilty of home invasion.
- (2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful defense of Lisa Seibert. **Remember to judge the defendant's conduct according to how the circumstances appeared to her at the time she acted.**
- (3) First, when she acted, the defendant must have honestly and reasonably believed that she had to act to protect Lisa Seibert from the imminent unlawful use of force by another. If her belief was honest and reasonable, she could act at once to defend Lisa Seibert, **even if it turns out later that she was wrong about how much danger Lisa Seibert was in.**
- (4) When you decide whether the defendant's actions were honest and reasonable, you should consider whether the defendant knew about any other ways of protecting Lisa Seibert, but you may also consider how the excitement of the moment affected the choice the defendant made.

¹⁵ Modification is necessary because the model jury instruction M Crim JI 7.22 was drafted to state the essential elements of self-defense and defense of others as those affirmative defenses relate to assaultive crimes. See *People v Kupinski*, unpublished opinion of the Court of Appeals, issued June 28, 2018 (Docket No. 328572).

- (5) Third, the right to defend another person only lasts as long as it seems necessary for the purpose of protection.
- (6) Fourth, the person claiming self-defense must not have acted wrongfully and brought on the assault. However, if the defendant only used words, that does not prevent her from claiming self-defense if she was attacked.

As a corollary to this instruction, counsel should have requested the instruction that the prosecution bore the burden of disproving, beyond a reasonable doubt, that Ms. Leffew acted in defense of Ms. Seibert. See M Crim JI 7.20.

Ms. Leffew had a constitutional right to “a properly instructed jury.” *People v Mills*, 450 Mich 61 (1995). Counsel’s failure to secure this right by requesting an instruction consistent with the defense he presented constituted deficient performance. There is no conceivable strategic purpose that would warrant foregoing this instruction.¹⁶

2. Ms. Leffew was prejudiced by counsel’s error.

At trial, Ms. Leffew argued that she entered Mr. Porter’s home in order to protect Ms. Seibert from imminent harm. But the instructions provided by the court did not inform the jury as to whether Ms. Leffew’s stated reasons for entering Mr. Porter’s home justified her actions, if believed. What’s more, the jury was not instructed that the prosecution bore the burden of disproving Ms. Leffew’s affirmative defense beyond a reasonable doubt.

Without a defense of others instruction, the jury was left with no direction on how

¹⁶ As part of her offer of proof in support of the motion to remand filed in the Court of Appeals, Ms. Leffew noted that appellate counsel spoke to trial counsel on January 15, 2019, and trial counsel stated his failure to request an affirmative defense instruction was one of omission, not one of strategy. See Statement of Facts and Material Proceedings, *supra*.

to consider the circumstances that led to Ms. Leffew entering Mr. Porter's home. Though the jury was instructed that malicious destruction of a building is done without "just cause or excuse," the jurors were left to their own devices to consider what constituted "just cause" under the law. 376a; see also 358a ("Whether it was wrong or not that's for you to decide."). The defense of others instruction would have done just that.

Contrary to the Court of Appeals assertion, an instruction on the negative element "without just cause or excuse" in the malicious destruction of a building charge is no substitute for an affirmative defense instruction. See *Canales*, 243 Mich App at 574. If it were, then affirmative defense instructions would never be required where a defendant charged with murder. See *People v Goecke*, 457 Mich 442, 463–64 (1998) (The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse).

"Jurors are presumed to follow their instructions . . .". *People v Abraham*, 256 Mich App 265, 279 (2003); see also *People v Chapo*, 283 Mich App 360, 370 (2009). Had the jurors been properly instructed on defense of others, they would have considered the events as Ms. Leffew honestly and reasonably believed them to be, making allowances for the excitement of the moment. Moreover, the jurors would have held the prosecution to their burden of disproving Ms. Leffew's affirmative defense beyond a reasonable doubt. Even assuming the jury credited Ms. Seibert's walked-back trial testimony regarding Mr. Porter's actions that night, it is reasonably likely that a properly instructed jury would have concluded Ms. Leffew's actions were justified.

Relying solely on Ms. Seibert's sanitized trial testimony, Ms. Leffew was confronted with the following information:

- Ms. Seibert wanted to leave Mr. Porter's home and needed a ride. (235a, 244a)
- Mr. Porter was upset and did not want her to leave. (229a)
- When Ms. Leffew arrived, Ms. Seibert was yelling at Mr. Porter. (244a)
- After Ms. Leffew knocked on the door, Mr. Porter answered. Ms. Seibert was standing behind him wearing her coat with a bag packed. (230a)
- At the door, Mr. Porter told Ms. Leffew he needed a few minutes to discuss the situation with Ms. Seibert. (222a, 230a)
- Mr. Porter's hand was on Ms. Seibert's hand, which was on the doorknob. (233a)
- Mr. Porter was "holding" Ms. Seibert while she was yelling and trying to leave. (233a)
- Mr. Porter "knock[ed]" Ms. Seibert to the ground while trying to convince her to stay. (234a-235a)
- Mr. Porter "sat" Ms. Seibert down in a chair, then leaned against her. (236a)

Given these facts, any reasonable juror would conclude Ms. Leffew was justified in entering a home without permission to protect her loved one who was seemingly trapped inside against her will and in imminent danger. Of course, establishing prejudice for purposes of an ineffective assistance of counsel claim does not require this Court to make such a definitive finding. Rather, this Court need only determine that it is reasonably probable that a properly instructed jury would have found Ms. Leffew's actions were justified.

Because there is at least a reasonable probability that the jury would have returned a not guilty verdict had they been given the proper instructions, prejudice is demonstrated, and Ms. Leffew is entitled to a new trial with a properly instructed jury.

Summary and Relief

WHEREFORE, for the foregoing reasons, Micheline Nicole Leffew asks that this Honorable Court grant her previously submitted application for leave to appeal and reverse her conviction.

Respectfully submitted,

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